No. 09-1387

In the Supreme Court of the United States

CAPITOL HOUSE PRESERVATION COMPANY, L.L.C.,

Petitioner,

v.

PERRYMAN CONSULTANTS, INC., M. RAY PERRYMAN, XYZ INSURANCE COMPANY, TUV INSURANCE COMPANY, JAZZ ENTERPRISES, INC., STEVE URIE, MARK BRADLEY, PAULA BRADLEY, RONALD JOHNSON, LODGING SYSTEMS, INC., CATFISH QUEEN PARTNERSHIP IN COMMENDAM, ARGOSY OF LOUISIANA, AND ARGOSY GAMING COMPANY,

Respondents.

On Petition for a Writ of Certiorari to the Louisiana Court of Appeal, First Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

FREDRICK R. TULLEY
Counsel of Record
Taylor, Porter, Brooks & Phillips L.L.P.
451 Florida Street, 8th Floor
Baton Rouge, LA 70801
Telephone: (225) 387-3221
fred.tulley@taylorporter.com

H. ALSTON JOHNSON III
Phelps Dunbar LLP
II City Plaza
400 Convention Street, Suite 1100
Baton Rouge, LA 70802
Telephone: (225) 346-0285
johnsona@phelps.com

Counsel for Argosy Gaming Company

QUESTIONS PRESENTED

Whether the Court has jurisdiction to determine the scope of statutory defenses to a state-law antitrust claim.

Whether the state court below correctly held that the *Noerr-Pennington* defense to antitrust liability applies where the defendant is alleged to have made misrepresentations in administrative proceedings, in circumstances where the reviewing court found, as a factual matter, that the defendant's challenged conduct did not "subvert the [agency's] decision-making process."

RULE 29.6 DISCLOSURE STATEMENT

Though the caption of this case includes four defendants, three of them (Jazz Enterprises, Catfish Queen Partnership in Commendam and Argosy of Louisiana, Inc.) were in bankruptcy proceedings at the time of the appeal in this case. As a result, the Louisiana First Circuit Court of Appeal's decision respected the stay resulting from the bankruptcy proceedings and does not address those three defendants. The First Circuit permitted the appeal to proceed as to Argosy Gaming Company, and undersigned counsel's representation in this Court is thus of Argosy Gaming Company. Occasional reference is made to "respondents" or "defendants" in the plural because those other three defendants were not in bankruptcy proceedings when the trial occurred.

Argosy Gaming Company is a Delaware corporation and is a wholly-owned subsidiary of Penn National Gaming, Inc., a publicly-held company.

Other persons affiliated with Jazz Enterprises, Inc., Catfish Queen Partnership in Commendam, and Argosy of Louisiana, Inc. are Mark Bradley, a Louisiana resident, and Ron Johnson and Steve Urie, Nevada residents, who were dismissed as defendants during the course of the litigation.

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JURISDICTION

Although petitioner asserts jurisdiction under 28 U.S.C. §1257(a), the Louisiana Court of Appeals disposed of this case on state law grounds. This Court accordingly lacks jurisdiction to hear the case.

STATUTORY PROVISIONS INVOLVED

The Louisiana Unfair Trade Practices and Consumer Protection Law ("LUTPL"), La. R.S. 51:1401 *et seq.*, is attached as an appendix to this brief.

STATEMENT OF THE CASE

In this case, a state intermediate appellate court applied principles borrowed from the *Noerr-Pennington* doctrine[1] to reject a *state-law* antitrust claim. This Court lacks jurisdiction to review that decision. Although the court below consulted and doubtless was influenced by federal law, state law controlled the outcome; the question decided below was one of state legislative policy concerning the scope of a state-law defense to a state-law cause of action. The case accordingly does not present a question of federal law.

In any event, even if jurisdiction in this Court does exist, the decision below would not warrant review. The court below issued a careful, well-considered analysis that is wholly consistent with this Court's *Noerr-Pennington* doctrine. Although petitioner asserts confusion in the lower courts on the question presented, the petition does not identify a single decision that is in conflict with the ruling in

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[1] The doctrine is identified with *Eastern R. R. Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), and *United Mine Workers* v. *Pennington*, 381 U. S. 657 (1965).

this case. And although petitioner contends that the question presented is an important and recurring one, that claim is belied by the petition itself; every lower court decision it cites is more than a decade old, and most are much older than that. The question presented here accordingly does not warrant this Court's attention. The petition should be denied.

1. Because this case involves an antitrust claim that grows out of agency procedures, it may be helpful to describe in some detail the governing state administrative and judicial processes. In 1991, the Louisiana Legislature enacted the Louisiana Riverboat Economic Development and Gaming Control Act, La. R.S. 4:501 *et seq.* (subsequently renumbered in 1996 as La. R.S. 27:41 *et seq.*, but those changes are not relevant to the present dispute). See Pet. App. A54-A67. The Act contained the licensing process for those seeking to operate riverboat gaming casinos in Louisiana, and limited the maximum number of licenses that could be issued to fifteen. The Act also created the Gaming Enforcement Division within the Office of the Louisiana State Police, which was vested with comprehensive regulatory and enforcement authority. The Division is an independent body of decision-makers with exclusive statutory authority to grant or deny license applications. Applicants who were denied a license by the Division and "persons aggrieved" by the Division's decisions could appeal first to the Louisiana Riverboat Gaming Commission (also created by the Act in 1991) and then to the 19th Judicial District Court. The Louisiana Court of Appeal, First Circuit, has intermediate appellate jurisdiction over all final judgments of the District Court, and the Louisiana Supreme Court has discretionary review authority and

jurisdiction over all decisions of the Louisiana courts of appeal. La. Const. art. V, §§5, 10, and 10(B).

The licensing process was rigorous and comprehensive. To be eligible for a license, applicants and persons affiliated with them were required to be of good character and integrity, with no criminal record. Before issuing a license, the Division was required to review the license application, conduct such investigation as needed, and after a hearing, find that (1) the proposed financing outlined by a license applicant was adequate and from a suitable source; (2) the applicant had secured appropriate docking facilities; and (3) the applicant had demonstrated adequate financial ability to construct and maintain a riverboat of the type required by the Act. See generally Pet. App. A54-A67. If the applicant did not prove by "clear and convincing evidence"[2] that it was qualified, or if the applicant failed to provide "information and documentation to reveal any fact material to qualification," or if the applicant failed to supply truthful information "as to a material fact pertaining to the qualification criteria," the Act directed the Division not to award a license if the defect was not corrected.[3]

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[2] La. R.S. 27:28, Pet. App. A-54. This standard of evidence in the Act has particular importance in this effort by petitioner to involve the judicial system in this process. It took "clear and convincing evidence" on the part of an entity seeking a riverboat gaming license to prove that it was qualified, and respondents satisfied that exacting standard. Now, Capitol House wants the judicial system to apply a lower standard (preponderance of the evidence) to permit it to prove that a competing entity was "not qualified."

[3] The Division did allow amendments and revisions to correct submissions and actually allowed another competitor to disas-

2. By 1994, all but two of the fifteen authorized licenses had been issued. The two remaining licenses were "earmarked" for Baton Rouge, and three groups filed applications for those. They were: (1) Lady Luck Baton Rouge Casino, Inc.; (2) Catfish Queen Partnership in Commendam and Jazz Enterprises, Inc.; and (3) Louisiana Casino Cruises, Inc. The petitioner in this case, Capitol House, owned a minority ownership interest (38%) in the Lady Luck applicant; 62% of the ownership was held by Lady Luck Corp., a Las Vegas casino operator. Respondent Argosy Gaming Company was a partner with Jazz Enterprises, Inc. in the Catfish Queen Partnership project. See Pet. App. A3-A4.

The Division engaged an independent economist (Dr. Ray Perryman of Baylor University) to review each application and rank the three applicants according to the probable economic impact each would have on the state and local economies if a license were granted to it. See Pet. App. A4. Apart from the economic evaluation, the Division and the State Attorney General's office independently reviewed and investigated the information submitted by the applicants. The Division held three days of hearings. Each of the three applicants made a presentation at the hearing, although none of them was allowed to cross-examine witnesses. As described by the Louisiana appellate court in detail, during the lengthy licensing process Capitol House, on behalf of Lady Luck Baton Rouge, raised a number of questions concerning the ownership, financial condition, and truthfulness of Jazz and persons affiliated with it.

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sociate from one of its owners after the Division determined that person had a criminal conviction. App., *infra*, 29. The process was thus not as rigid as portrayed by petitioner.

The Division thoroughly investigated these allegations and nevertheless found Jazz suitable. See Pet. App. A31-A37.

Dr. Perryman ultimately ranked the development plan presented by Catfish Queen/Jazz first by a wide margin, the Casino Cruises project second, and the Lady Luck project a distant third. Pet. App. A4. In ranking the three proposed projects, Dr. Perryman considered what might happen "realistically," as opposed to what each application promised or represented would occur. Dr. Perryman determined that the economic effect of the Catfish Queen/Jazz project would be more than double that of Capitol House's project. On July 18, 1994, the Division awarded the two remaining licenses to Catfish Queen/Jazz and Casino Cruises, denying Lady Luck Baton Rouge's application. App., *infra*, 23; Pet. App. A4-A5.

In its written report, the Division concluded that the two successful applicants met the requirements contained in the Act and then cited Dr. Perryman's economic study, showing that those two projects would likely generate the most economic benefit to the region. App., *infra*, 12-15. In its reasons, the Division questioned Lady Luck Baton Rouge's ability to fund the project and expressed concern about potential delays of a year or more in obtaining the necessary permits and docking facilities, which unlike the two successful applicants, Lady Luck Baton Rouge had yet to obtain. App., *infra*, 14-15, 32.[4] Weighing

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[4] Lady Luck Baton Rouge did not own any property on the river nor any contractual rights affording it access to the river. See App., *infra*, 14. Whether it ultimately could obtain such rights was entirely speculative.

those concerns against its findings regarding the other applicants, the Division awarded the two remaining licenses to the other two applicants.[5] The Division declined to award a license to Lady Luck Baton Rouge, noting that the Division was unable under the Act to issue a final decision regarding Lady Luck Baton Rouge's suitability because no licenses were available and such a decision would be advisory only. App., *infra*, 24-30.

At this point, although the Act authorized Lady Luck Baton Rouge to appeal the denial to the Louisiana Riverboat Gaming Commission, there was no appeal by that entity.[6] Lady Luck (the owner of the controlling 62% interest) decided to abandon the project rather than appeal.[7] The disappointed applicant thus did not pursue the established administrative review process. After the deadline to appeal to the Commission had passed, Lady Luck sold its 62% interest in Lady Luck Baton Rouge to Capitol House for a nominal price ($620.00). Capitol House then executed a "reverse merger" with Lady Luck Baton Rouge, with Capitol House emerging as the surviving business entity. Capitol House then attempted to appeal the adverse decision to the judicial system in its

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[5] In a supplemental ruling requested by Lady Luck Baton Rouge after the denial of its license application, the Division found that Lady Luck Baton Rouge was "suitable," but expressly reiterated its prior findings and reasons for denying the application. App., *infra*, 31-33.

[6] Capitol House filed an appeal with the Commission in its own name, but because it was not the applicant the appeal was denied. See *Capitol House Preservation Co., L.L.C. v. The Louisiana Riverboat Gaming Commission*, 682 So.2d 1323 (La. App. 1st Cir.1996).

[7] *Ibid.*

own name, claiming to be a "person adversely affected" by the award of the two licenses to the competing projects. The 19th Judicial District Court rejected the appeal, however, and the First Circuit Court of Appeal affirmed, holding that a minority shareholder was neither the "applicant" nor a "person adversely affected" by the denial of the license application.[8]

3. Capitol House then filed suit for money damages, naming as defendants one of the winning license applicants and persons affiliated with it. Capitol House claimed that the defendants violated the LUTPL by making materially false and deceptive statements to the Louisiana riverboat licensing authority to induce it to issue a license to the Catfish Queen/Jazz group. Pet. App. A5. Capitol House claimed the misrepresentations should have disqualified the defendants and that, had they been disqualified, Lady Luck Baton Rouge would have received one of the licenses. Capitol House sought to recover the loss of its investment spent pursuing the license, the value of a gaming license, and any past and future lost profits that would have been derived from its hoped-for riverboat and related business projects, had Lady Luck received the license instead of Catfish Queen/Jazz.

After a trial, the jury rendered a verdict in the approximate amount of $3 million in favor of Capitol House, finding that the defendants violated the LUTPL by making material misrepresentations to

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[8] *Id.* at 1326. The First Circuit also held that only the applicant (Lady Luck Baton Rouge), which chose not to appeal, and not Capitol House, had standing "to challenge the denial of the license." *Ibid.*

the Division. But for the false and misleading statements, the jury found, Lady Luck Baton Rouge would have received a license. Pet. App. A6-A11.

On the defendants' appeal to the Louisiana Court of Appeal, First Circuit, the appellate court reversed. Pet. App, A2-A40. Noting that the LUTPL prohibits the same types of anticompetitive and deceptive conduct as does the Federal Trade Commission Act, 15 U.S.C. § 41 *et seq.*, and that the state statute expressly permits conduct that complies with the FTC Act, the court explained that, "in interpreting Louisiana's statute, a court must consider how the Federal Trade Commission and the federal courts have applied the Federal Trade Commission Act to various types of conduct." Pet. App. A15. This aspect of state law required the court to consider the "antitrust law defense[] recognized by the federal courts" in the "*Noerr-Pennington* immunity doctrine," which precludes the imposition of antitrust liability for "anticompetitive activity in the form of lobbying or advocacy before any branch of either federal or state government." *Id.* at A15, A16.

The state court accordingly canvassed the *Noerr-Pennington* decisions of this Court and the federal courts of appeals. Pet. App. A16-A22. It concluded that this Court's decisions "did not foreclose a misrepresentation or fraud exception to the Noerr-Pennington immunity doctrine when the misrepresentation or fraud occurred outside of the political arena" (*id.* at A22), so long as the "defendants' alleged misrepresentations subverted the entire decision-making process to the extent that the [agency] was effectively no longer the real decision maker." *Id.* at A26.

The court held, however, that petitioner could not make such a showing on the record here. After a detailed review of the record (Pet. App. A30-A37), the court found that the Division was aware of the issues relating to each of respondents' alleged misrepresentations and, exercising its informed discretion, nevertheless issued the license to respondents. The court accordingly concluded "that the defendants' misrepresentations and/or omissions, when considered independently or collectively, did not subvert the Division's decision-making process to the extent that the Division could not effectively evaluate the three proposed projects and make an informed decision as to which of the applicants should receive the two licenses." *Id.* at A37. The court found this "conclusion further supported by the fact that the Division, an independent body of disinterested decision-makers, did not take all representations at face value and it had the opportunity to review and investigate the information submitted by the applicants." *Ibid.* The court therefore held that petitioner's LUTPL claims must be rejected under the *Noerr-Pennington* doctrine.[9]

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[9] Petitioner had pointed to three alleged misrepresentations made by respondents. First, petitioner contended that the Jazz application listed an individual who had an ownership interest in Jazz as a director rather than an owner. The court found, however, that "Capitol House raised the specific issue regarding [this person's] ownership interest in Jazz during the course of the licensing proceedings"; that "[t]he Division investigated this specific allegation and was apparently satisfied with its findings"; and that "[t]he Division conducted the requisite background check on [this individual] as well as other Jazz shareholders and determined that they were all suitable." Pet. App. A30-A31. Second, petitioner alleged that the Jazz application failed to list respondents' contingent liabilities. The court found,

The court also rejected petitioner's contention that it had raised additional state-law tort claims not subject to a *Noerr-Pennington* defense. The court explained that "tort law claims based on allegations of intentionally false or misleading statements by the defendants to the Division are subsumed in the alleged violations of the UTPL." Pet. App. A37-A38. Alternatively, the court concluded that, even if petitioner's claims "could be considered outside the antitrust context," they would be barred under the Louisiana Supreme Court's holding in *Astoria Entertainment, Inc. v. DeBartolo*, 12 So.3d 956 (La. 2009), which ruled that acts of petitioning a state agency would not support liability unless they "rose to the level of criminality." Pet. App. A38.

The Louisiana Supreme Court denied petitioner's application for writ of review. Pet. App. A1.

ARGUMENT

Petitioner's arguments for review are flawed at every level. As a threshold matter, there is no federal jurisdiction in this case, in which the challenged decision determined the scope of a state-law defense to a state-law claim arising in state court. But review

however, that "the Division was aware of the amount owed"; that "Capitol House failed to show that the[] exclusion [of certain amounts from disclosure] was intentional"; and "that the Division was vested with discretion to decide what level of undisclosed debt the Division considered material for its licensing decision." *Id.* at A32-A33. Finally, petitioner alleged that respondents overstated their funding. The court found, however, that "the Division was aware of the allegations made against Jazz with regard to its ability to obtain financing"; that "Perryman, in ranking the three proposed projects, considered what might happen 'realistically' as opposed to what each applicant promised"; and that respondents' projections accordingly "did not subvert the decision-making process." *Id.* at A36-A37.

would be unwarranted even if this Court had jurisdiction. The decision below rests on an unexceptional application of this Court's precedents. And petitioner has not identified any other court that would find an exception to *Noerr-Pennington* immunity in circumstances like those in this case, where the defendant's alleged misstatements were made to a state agency that was empowered to, and did, make an independent examination of the facts underlying those representations. The petition accordingly should be denied.

I. THIS COURT DOES NOT HAVE JURISDICTION OVER THIS CASE.

At the outset, the Court lacks jurisdiction to decide this case: the petition presents only a state-law question. This Court's jurisdiction to review final state-court judgments is constrained by 28 U.S.C. § 1257(a). And it is fundamental that, under section 1257(a), the Court may issue a writ of certiorari to a state court only when the "state court determination[] . . . rest[s] upon federal law." *Oregon* v. *Guzek*, 546 U.S. 517, 521 (2006); see also *Herb* v. *Pitcairn*, 324 U.S. 117, 125-26 (1945) ("Our only power over state court judgments is to correct them to the extent that they incorrectly adjudge federal rights."); *Henry* v. *Mississippi*, 379 U.S. 443, 447 (1965) ("[W]e have no power to revise judgments on questions of state law.").

The decision below, however, rests on *state* law. The question in this case concerns – exclusively – the scope of liability under the LUTPL. Petitioner himself acknowledges as much; the petition notes repeatedly that "Petitioner has asserted only state law claims here." Pet. 19; see *id.* at 21 ("Petitioner has not asserted any antitrust claims here, but only

claims under Louisiana tort law."). On the face of it, there is no federal question here that would give this Court jurisdiction.

To be sure, a federal question may be involved when a state-law question is intertwined with one of federal law, or where state law in some sense incorporates federal law. See Eugene Gressman, *et al.*, SUPREME COURT PRACTICE 212-13 (9th ed. 2007). And because the LUTPL is patterned on and refers to the FTC Act, the court below looked to federal decisions for guidance in reading a *Noerr-Pennington* analog into state law: as that court noted, Louisiana courts "may and should consider interpretations of the Federal courts and of the Commission relative to such similar statutes to adjudge the scope and application of our own statute." Pet. App. A15 n. 7 (quoting *Guste v. Demars*, 330 So.2d 123 (La. App. 1st Cir. 1976)).

But this is not a case where the state court even arguably *applied* federal law or recognized a right that is enforceable *as a matter of federal law*. *Compare, e.g.*, *Michigan* v. *Long*, 463 U.S. 1032, 1040-42 (1983). Instead, the central issue before the Louisiana courts below was the scope of a state antitrust statute, the LUTPL. While patterned after Section 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. §45(a)(1), the LUTPL nonetheless is a *state* law that prohibits firms engaged in trade or commerce in Louisiana from using "unfair and deceptive trade practices," of the type that could threaten free and fair competition in the marketplace in Louisiana. As a consequence, the *Noerr-Pennington* type of immunity approved by the Louisiana appellate court below was in all respects strictly a state-law defense to state-law claims. If the Louisiana Legislature de-

cided tomorrow to amend the statute to eliminate the *Noerr-Pennington* defense altogether, nothing would prevent it from doing so, regardless of federal law. For that reason, the question presented here is not federal in nature.

Were there any doubt on this point, the Court nevertheless should deny review as a prudential matter. To say the least, it would be extraordinary for the Court to settle the meaning of federal law in a state court action advancing only state-law claims, where the state court as a matter of its own discretion has looked to federal law for guidance. In such circumstances, this Court would be deciding an abstract and theoretical question were it to review the holding below, with no assurance that its decision would have any impact on the ultimate disposition of the case; after all, if this Court disagreed with the state court's understanding of *Noerr-Pennington*, that court would be free on remand to reject this Court's guidance and reinstitute its ruling as a mater of state law. A holding by this Court therefore would amount to little "'more than an advisory opinion.'" *Michigan* v. *Long*, 463 U.S. at 1042-43 (quoting *Herb*, 324 U.S. at 125). If the *Noerr-Pennington* question presented in the petition really is an important and recurring one, the Court will have ample opportunity to address it in a case from federal court that presents it directly as a matter of federal law.

II. THE LOUISIANA APPELLATE COURT'S DECISION IS CONSISTENT WITH THIS COURT'S PRECEDENT.

Even apart from the question of this Court's jurisdiction, this case does not warrant the Court's consideration. Although the petition's presentation is a bit muddled, it appears to advance two principal

grounds for review: that the court below "radically extended the *Noerr-Pennington* doctrine to protect intentional, material misrepresentations submitted to an agency acting solely as an adjudicatory body" (Pet. 11), ostensibly in conflict with this Court's decisions; and that the lower courts are divided on the application of *Noerr-Pennington* in such circumstances. *Id.* at 31-33. But petitioner is wrong on both counts. In fact, the holding below is wholly consistent with this Court's decisions, which have never recognized an exception for *Noerr-Pennington* immunity of the sort advanced by petitioner. And the petition does not identify any conflict between the decision below and the holdings of other courts that have applied *Noerr-Pennington* in circumstances like those of this case. For these reasons as well, the petition should be denied.

A. The Holding Below Is Consistent With This Court's Decisions.

1. The underlying principles that govern here are settled and uncontroversial. *Noerr* and subsequent decisions establish that "[t]hose who petition government for redress are generally immune from antitrust liability." *Professional Real Estate Investors, Inc. v. Columbia Pictures, Inc.*, 508 U.S. 49, 56 (1993) ("*PREI*"). The Court has also recognized a limited "sham" exception to this immunity, which applies when the defendant invoked the processes of a court or agency in a manner that is *both* "objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits," and subjectively flawed in the sense that it is "'an attempt to interfere *directly* with the business relationships of a competitor' . . . through the 'use [of] the governmental *process* – as opposed to the *outcome* of that

process – as an anticompetitive weapon." *Id.* at 60-61 (emphasis in original) (quoting *City of Columbia* v. *Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 380 (1991)).

Although the petition uses the term "sham" loosely in characterizing respondents' conduct, it is plain that the *Noerr-Pennington* sham exception recognized by this Court is not applicable here. "Sham" liability may be imposed only when both elements of the sham test are satisfied. But *neither* is satisfied in this case. The court below found that the Division knew of the defendants' alleged misstatements and awarded the license anyway; thus, respondents' action was not only objectively reasonable, it was *meritorious*. As for the subjective component of the test, the court below found that respondents, "in attempting to obtain a gaming license, sought to procure favorable governmental action and were not attempting to interfere directly with the business relationships of their competitors." Pet. App. A18.

Petitioner therefore must contend that this Court has fashioned a general "fraud" exception to *Noerr-Pennington* antitrust immunity that goes beyond the familiar sham doctrine and that comes into play whenever the antitrust defendant makes misleading statements to a governmental decision-maker. But on the face of it, that contention also is wrong. In fact, in *PRE*, which post-dates most of the decisions relied upon by Capitol House, the Court expressly stated it was *not* deciding "whether and, if so, to what extent *Noerr* permits the imposition of antitrust liability for a litigant's fraud or other misrepresentations." *Id.* at 61 n. 6. The Court has not revisited that question in the intervening years.

2. Petitioner nevertheless insists, improbably, that the decision below departs from this Court's precedent, relying principally on three decisions: *California Motor Transport* v. *Trucking Unlimited*, 404 U.S. 508 (1972); *Allied Tube & Conduit Corp.* v. *Indian Head, Inc.*, 486 U.S. 492 (1988), and *BE&K Construction Co.* v. *NLRB*, 536 U.S. 516 (2002). *See* Pet. 11, 16-19, 20-21.[10] But petitioner is wrong: those decisions are not in conflict with the holding of the Louisiana appellate court.

a. In *California Motor Transport*, a group of highway carriers routinely opposed their competitors' applications for operating rights in administrative and judicial proceedings, irrespective of the strength or weakness of any given application. The Court there recognized that the *Noerr-Pennington* doctrine should apply in the adjudicatory context: "[t]he right to petition extends to all departments of the Government. The right of access to the courts is indeed but one aspect of the right of petition." 404 U.S. at 510. In nevertheless finding support in *California Motor Transport*, petitioner relies on the Court's recognition that "[m]isrepresentations, con-

[10] Capitol House also cites *Walker Process Equipment, Inc.* v. *Food Machinery & Chemical Corp.*, 382 U.S. 172 (1965), in arguing that this Court has recognized a fraud exception to *Noerr-Pennington*. There, the Court held that enforcement of a patent procured by fraud on the Patent Office may be violative of §2 of the Sherman Act, 15 U.S.C. §2. Significantly, the Court based its decision on the strong public interest in the proper possession and enforcement of patent rights, which are lawful exceptions to the general rule prohibiting monopolies. Like *California Motor Transport* and *Allied Tube*, *Walker* pre-dates *PREI*.

doned in the political arena, are not immunized when used in the adjudicatory process." *Id.* at 513. But the Court carefully limited this aspect of the "sham" exception, explaining that it comes into play when there is "a pattern of baseless, repetitive claims" that "effectively bar[] [the injured party] from access to the agencies and courts." *Id.* at 513. *See id.* at 515 (sham exception applies when defendants "harass and deter their competitors from having access to the agencies and courts"); 518 (Stewart, J., concurring in the judgment) ("the real *intent* of the conspirators was not to invoke the processes of the administrative agencies and courts, but to discourage and ultimately to prevent [their competitors] from invoking those processes").

That standard was not satisfied here, for two reasons. First, the state appellate court found that there was no abuse of the administrative process. The Division independently investigated all of the alleged misrepresentations, apparently decided they were immaterial, and then awarded the licenses on the basis of policy considerations: the two licensee casino projects had the best chance of producing favorable economic results for the region. Significantly, there was no trial or any other form of adversarial proceeding. Instead, a legislatively created board heard presentations from the potential licensees, vetted each of the licensees and their owners and financiers, and then issued licenses based on the expected economic benefit to the state of Louisiana. This is a standard based on considerations of policy, rather than an adjudicatory determination.[11]

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[11] The Act directed the Division to award licenses "if the issuance of a gaming license to the applicant is in the best inter-

Second, even if the process were deemed adjudicatory rather than an exercise of policy-making, the defendants' actions can hardly be considered "baseless" or "repetitive." The alleged misrepresentations were clearly intended to achieve a favorable result from the licensing board. Whereas the Court noted in *California Motor Transport* that the conspirators "sought to bar their competitors from meaningful access to adjudicatory tribunals and so to usurp that decision-making process" (404 U.S. at 512), the defendants in this case actually sought the gaming licenses – not to deny Lady Luck Baton Rouge access to the administrative process. Lady Luck Baton Rouge was heard by the Division, which, after considering the alleged misrepresentations, still decided to award the license to the Catfish Queen/Jazz project. See Pet. App. A31-A37. Because the Division was clearly aware of the alleged conduct that forms the basis of this suit prior to reaching a decision, the process has not been "abused" within the meaning of *California Motor Transport*.

b. The second decision invoked by petitioner, *Allied Tube*, was an antitrust suit brought by a plastic conduit manufacturer against steel conduit manufacturers after the defendants effectively stuffed the ballot box in a private electrical industry board's voting procedure. The vote was to set the private organization's safety standards. The defendants claimed *Noerr-Pennington* immunity because the private organization they fraudulently influenced would likely later influence political bodies that would adopt the private organization's standards. The voting members of the private board were parties that owned

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ests of the state and consistent with the intent of the legislature as expressed in this Chapter." Pet. App. A66.

companies in the industry, thereby giving each member a stake in the outcome of the proceedings. See 486 U.S. at 495-99. This Court's holding that the defendant was not shielded by *Noerr-Pennington* immunity was "expressly limited to cases where an 'economically interested party exercises *decision-making* authority in formulating a product standard for a private association that comprises market participants.'" 486 U.S. at 511 n.13 (emphasis in original). In those circumstances, "[w]hat distinguish[ed] th[e] case from *Noerr* and its progeny is that the context and nature of [the defendant's] activity make it the type of commercial activity that has traditionally had its validity determined by the antitrust laws themselves." *Id.* at 505. *See id.* at 506 (emphasizing that the challenged activity took place "within the confines of a private standard-setting process").

The instant case is nothing like *Allied Tube*. Here, the license applicants petitioned a legislatively created licensing board composed of disinterested members of the Office of the Louisiana State Police. Moreover, while this Court recognized in *Allied Tube* that a "misrepresentation to a court would not necessarily be entitled to the same antitrust immunity allowed deceptive practices in the political arena," we have noted that a legislatively created board weighing a discretionary decision does not function in an adjudicatory manner. *See* 486 U.S. at 504. Capitol House itself quotes *Allied Tube*'s premise that "the *Noerr* immunity of anticompetitive activity intended to influence the government depends not on its impact, but also on the context and nature of the activity." Pet. 17 (quoting 486 U.S. at 504). And that context here points in favor of immunity.

c. In *BE&K*, the third decision cited by petitioner, the Court acknowledged that *Noerr Pennington* immunity can exist in contexts outside of antitrust law, applying it to the National Labor Relations Act. *BE&K*, 536 U.S. at 526. That holding is completely irrelevant to the instant case, as the LUTPL is a state antitrust law. See Pet. App A14, A15, A24. *BE&K* also applied the two-part sham test articulated by the Court in *PREI* (see 536 U.S. at 526) – but, as we have explained, the sham exception has no application here. *BE&K* therefore adds nothing to petitioner's case.

At bottom, the exercise undertaken by the Louisiana court mirrored the appropriate analysis this Court described in *California Motor Transport*. This Court observed that the issue that should be addressed is whether "the administrative and judicial processes have been abused," which "may be a difficult line to discern and draw." 404 U.S. at 513. Here, the Louisiana appellate court drew that line, found that the process had *not* been abused, and determined that the license applicant in which Capitol House had an interest was not barred from access to the agencies and courts. That holding was correct and need not be reviewed by this Court.[12]

[12] The conclusion that *Noerr Pennington* immunity applies here is supported by the Federal Trade Commission's opinion in *In the Matter of Union Oil Co. of California*, FTC Docket No. 9305, 2004 WL 1632816 *11 (F.T.C. 2004), which thoroughly addressed the state of the law regarding a "fraud or illegal conduct" exception to *Noerr-Pennington*. The Commission identified a number of factors that must be balanced in determining whether a party's misrepresentations to an administrative or judicial body are sufficient to justify recognizing an exception to *Noerr Pennington* immunity. Of particular importance here,

B. There Is No Conflict In The Circuits.

Petitioner also is incorrect in asserting that the lower courts are in disarray on the approach to a "fraud" exception to *Noerr Pennington*. The decisions cited by petitioner in support of this proposition are all more than a decade old, predating this Court's more recent *Noerr-Pennington* holdings. And petitioner does not, in any event, cite any decision of any court declining to recognize *Noerr-Pennington* immunity in circumstances like those of this case, where the challenged statements were made to an agency that conducted a full and independent determination after becoming aware of the allegations of falsity. There accordingly is no need for review by this Court.

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the Commission recognized that "the scope of immunity depends on the degree of political discretion exercised by the government entity," quoting *Kottle* v. *Northwest Kidney Centers*, 146 F.3d 1056, 1062 (9th Cir. 1998), cert. denied, 525 U.S. 1140 (1999). It also regarded as relevant the extent to which the government agency necessarily relied upon the defendant's factual assertions and the court's ability to establish a causal link between the wrongful conduct and ensuing government action. *Union Oil*, *supra*, at *20-21. In that context, the Commission explained why it made sense that there should be immunity where an agency has the "practical ability to probe behind petitioner's assertions," as in *Armstrong Surgical Center, Inc.* v. *Armstrong County Memorial Hospital*, 185 F.3d 154 (3rd Cir. 1999), cert. denied, 530 U.S. 1261, or where there was no causal connection between the government's decision and the misrepresentations, as in *Cheminor Drugs, Ltd.* v. *Ethyl Corp.*, 168 F.3d 119 (3rd Cir.), cert denied, 528 U.S. 871 (1999). Here, all of those considerations support immunity: the Division exercised broad discretion, was authorized to and did look behind the parties' factual assertions, and (for that reason) there was no causal link between the alleged misrepresentations and the Division's license decisions.

1. There is one federal appellate decision that parallels this case in nearly all respects, *Armstrong Surgical Center, Inc.* v. *Armstrong County Memorial Hospital*, 185 F.3d 154 (3rd Cir. 1999), cert. denied, 530 U.S. 1261. As petitioner itself recognizes (Pet. 32), that decision is fully consistent with the holding below in this case.

In *Armstrong*, the Third Circuit recognized that *Noerr-Pennington* immunity extends to parties alleged to have deceived state regulators so as to preserve their monopoly over outpatient surgery. The defendant hospital was the only hospital with operating rooms in Armstrong County, with the closest independent surgical center fifty miles away. The plaintiff planned to build a directly competing outpatient facility. Pennsylvania law required the state Department of Health to issue a certificate of need before approving the construction of a new surgical facility. See 185 F.3d at 155-56.

To preserve its monopoly, the defendant hospital sought to influence the Department's decision regarding the issuance of such a certificate to the plaintiff. The hospital's staff physicians falsely represented to the Department that they planned to boycott the plaintiff's proposed facility. The hospital also claimed that it was building its own outpatient surgical center, even though that center's construction had ceased and was not expected to resume. The Department denied the plaintiff's request for a certificate of need, reasoning that a new center would be duplicative of current facilities and ineffective because of the planned boycott. The plaintiff sued under the Sherman Act, alleging a conspiracy to prevent it from establishing an outpatient surgery center. See 185 F.3d at 156-57.

Relying on this Court's decision in *Omni Outdoor Advertising*, the *Armstrong* court held that even when private persons induce government action through misrepresentation, the activity remains within the *Noerr-Pennington* immunity:

> Liability for injuries caused by such state action is precluded even where it is alleged that a private party urging the action did so by bribery, deceit or other wrongful conduct that may have affected the decision-making process. The remedy for such conduct rests with the laws addressed to it and not with courts looking behind sovereign state action at the behest of antitrust plaintiffs.

Armstrong, 185 F.3d at 162. The court in *Armstrong* also reasoned that *Omni Outdoor Advertising* required dismissal "given the conceded presence [in *Armstrong*] of disinterested decision-makers, an independent investigation, an open process, and extensive opportunities for error correction." *Id.* at 164. All of those considerations are present here, and the court below relied on them – and on *Armstrong* – in rejecting petitioner's claim. See Pet. A26.

2. Although *Armstrong* is on all fours with this case, the assertedly conflicting decisions cited by petitioner (at Pet. 32) are not: all differ from this case in material ways. In *Kottle* v. *Northwest Kidney Center*, 146 F.3d 1056 (9th Cir. 1998), cert. denied, 525 U.S. 1140 (1999), the court recognized a sham exception to *Noerr-Pennington* when misrepresentations to a court or agency were so extreme that "the entire [agency] proceeding was deprived of its legitimacy" (*id.* at 1063); but for the reasons explained by the court below (at Pet. App. A-37), that standard is

not satisfied here. In *St. Josephs Medical Center* v. *City Hospital Ass'n*, 795 F.2d 948, 955 (11th Cir. 1986), the court opined that misrepresentations to an agency ruling on applications for benefits are not immune from liability, but there was no indication in that case (unlike this one) that the agency was able to make an independent determination notwithstanding the misstatements. *See id.* at 952. The same was true in *Potters Medical Center* v. *City Hospital Ass'n*, 800 F.2d 568, 580-81 (6th Cir. 1986) – where, in addition, the plaintiff's claim was *rejected* on *Noerr-Pennington* grounds because the defendant denied knowing falsity. *Id.* at 581. And in *Armstrong*, the Third Circuit itself explained that *Cheminor Drugs, Ltd.* v. *Ethyl Corp.*, 168 F.3d 119 (3d Cir.), cert. denied, 528 U.S. 871 (1999), has no application where, as here, "the plaintiff affirmatively alleges that defendants' purpose was to secure the *outcome* of the process" (185 F.3d at 159 n.2 (emphasis in original)); *Cheminor* refused "to carve out a new exception" to *Noerr-Pennington* immunity that extended beyond the limits of the sham exception. 168 F.3d at 123.[13]

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[13] Petitioner also finds support in the Fifth Circuit's forty-year-old decision in *Woods Exploration & Producing Company, Inc.* v. *Aluminum Company of America*, 438 F.2d 1286 (5th Cir. 1971), cert. denied, 404 U.S. 1047 (1972). See Pet. 28-29. But there is no merit to that argument. In *Woods*, the court rejected a *Noerr-Pennington* defense to the claim that the defendant submitted false data to an administrative agency because, once the submissions had been made, there was "no opportunity for meaningful supervision or verification" of them. 438 F.2d at 1295. The court found that the agency relied on the truthfulness of the private parties that submitted data and often accepted their estimates at face value without investigation. In that setting, the court concluded that the agency "neither was

Because there was no square conflict in the lower courts, the United States and the FTC jointly *opposed* the petition for certiorari in *Armstrong*. See No. 99-905, *Armstrong Surgical Center, Inc.* v. *Armstrong County Mem. Hosp.*, Br. for the United States and the Federal Trade Commission as Amici Curiae ("U.S. *Armstrong* Br."). Discussing each of the decisions cited by petitioner in this case, the United States and FTC noted that, although these decisions were "in some tension with [*Armstrong*]," "[m]ost of the cases cited were decided before *PREI* and *Omni*, which may . . . account for a good deal of that tension." *Id.* at 15. The United States and FTC likewise noted that "[t]he cited cases are also distinguishable from[*Armstrong*] on their facts." *Ibid.* And they added that, "[s]o far as we are aware, no court of appeals has considered or affirmed an actual judgment awarding damages against a private defendant for competitive injuries inflicted most directly by state action, where the action was allegedly procured by the defendant's fraud." *Ibid.* The United States and FTC therefore concluded that, "although future cases may reveal a conflict that will call for intervention by this Court, whatever difference in approach currently exists does not demand review in this case" (*id.* at 16); "there is no direct conflict among the circuits on the question presented here, and any apparent divergence in the reasoning of the lower courts does

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the real decision maker nor would have intended its order to be based on false facts." *Ibid. See Armstrong*, 185 F.3d at 164, n.8. Here, in contrast, the court below expressly premised its decision on its conclusion that "the Division, an independent body of disinterested decision-makers, did not take all representations at face value and . . . had the opportunity to review and investigate the information submitted by the applicants." Pet. App. A37.

not require immediate review by this Court." *Id.* at 20.

The United States and FTC also identified additional considerations that militated against review in *Armstrong* – and that do so here, as well. They explained that "[t]he Court's decisions counsel caution in fashioning any theory of antitrust liability that would allow a plaintiff to recover damages from a private defendant for competitive injuries caused most directly by state administrative or adjudicatory action, such as the denial of a [license]." U.S. *Armstrong* Br. 16. They noted that "[t]he inquiry involved in substantiating or repudiating such a claim may involve 'look[ing] behind the actions of state sovereigns' in a way this Court has disfavored." *Id.* at 17 (quoting *Omni Outdoor Advertising*, 499 U.S. at 379). They observed that "there are presumably other remedies" available for abuse of state administrative and judicial processes." *Id.* at 18. "And even if such concerns could be mitigated or overcome," they added, "it is open to question whether the vindication of plaintiffs' rights in whatever number of cases proved both adjudicable and meritorious would adequately reward the judicial effort that would be involved in crafting and administering antitrust doctrine in this delicate area, and the private expense involved in litigating any claims that would ultimately be rejected." *Ibid.*

Given those considerations, the United States and FTC concluded that, "[b]ecause the question is difficult, the number of potentially relevant factual variables large, and the present appellate authority sparse and somewhat dated, . . . review by this Court should await the illumination of further experience with such claims in the courts of appeals." U.S.

Armstrong Br. 20. That same conclusion remains true today. In the years since the government opposed review in *Armstrong*, this Court has not revisited whether, or in what circumstances, misrepresentations to agencies or courts fall outside *Noerr-Pennington* immunity. And petitioner has not pointed to *any* relevant antitrust decision in the courts of appeals that post-dates *Armstrong*. The existing appellate authority addressing the issue presented here therefore is just as "sparse," and much *more* "dated," than it was when the government opposed (and the Court denied) review in *Armstrong*. The same outcome is appropriate here.[14]

Finally, the United States and the Federal Trade Commission also pointed to one additional consideration that militated strongly against review in *Armstrong*, and does so here as well: although "[t]he need for circumspection is . . . plain," "this case does not appear to be one in which the argument for liability can be advanced forcefully." U.S. *Armstrong* Br. 19. As in *Armstrong*, here the agency "process is administrative, and in some respects adjudicatory, but it also has aspects that are 'political' in the *Noerr* sense." *Ibid.* (citation omitted). Also as in *Armstrong*,

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[14] One of the secondary authorities cited by petitioner (at Pet. 33) notes that the Court has "routinely denied certiorari to review the most important decisions in the courts of appeals considering whether, and if so, in what circumstances, antitrust liability may be imposed for the anticompetitive effects of government action induced by fraud." The author added that "the Solicitor General was on solid ground in urging a cautious approach on this difficult issue" in recommending against review in *Armstrong*. Floyd, *Antitrust Liability for the Anticompetitive Effects of Government Action Induced by Fraud*, 69 Antitrust L.J. 403, 408, 410 (2001).

here "[t]he process . . . featured 'an independent investigation, an open process, and extensive opportunities for error correction." *Id.* at 19-20 (citation omitted). Even more than in *Armstrong*, it is doubtful that in this case the agency's "decision depended on the alleged misrepresentations"; "there is no indication that petitioner ever sought clarification of that point, or asked the [agency] to reconsider and reverse its decision on grounds of fraud." *Id.* at 20. As in *Armstrong*, then, petitioner "is not well placed to argue that it was 'bar[red] from meaningful access to adjudicatory tribunals,' or that respondents effectively 'usurp[ed]' the legitimate public 'decisionmaking process.'" *Ibid.* (quoting *California Motor Transp.*, 404 U.S. at 20). And because this case has the additional drawback of involving a state court's resolution of a state-law claim, it presents a *uniquely unfavorable* vehicle with which to address the question presented, even assuming that question otherwise would warrant the Court's attention. For all of these reasons, further review is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

FREDRICK R. TULLEY
Counsel of Record
Taylor, Porter, Brooks & Phillips L.L.P.
451 Florida Street, 8th Floor
Baton Rouge, LA 70801
fred.tulley@taylorporter.com
Telephone: (225) 387-3221

H. ALSTON JOHNSON III
Phelps Dunbar LLP
II City Plaza
400 Convention Stree
Suite 1100
Baton Rouge, LA 70802
johnsona@phelps.com
Telephone: (225) 346-0285

Counsel for Argosy Gaming Company

JULY 14, 2010

LSA – R.S. 51, § 1401. Short title

This Chapter shall be known and may be cited as the "Unfair Trade Practices and Consumer Protection Law."

LSA – R.S. 51, § 1402. Definitions

As used in this Chapter, the following words and phrases shall have the meanings hereinafter ascribed to them:

(1) "Consumer" means any person who uses, purchases, or leases goods or services.

(2) "Consumer interest" means those acts, practices, or methods that affect the economic welfare of a consumer.

(3) "Consumer transaction" means any transaction involving trade or commerce to a natural person, the subject of which transaction is primarily intended for personal, family, or household use.

(4) "Disabled person" means a person with a mental, physical, or developmental disability that substantially impairs that person's ability to provide adequately for his own care or protection.

(5) "Documentary material" means the original or a copy of any book, record, memorandum, paper, communication, tabulation, map, chart, photograph, mechanical transcription, or other tangible document or recording, wherever situated.

(6) "Elder person" means any person sixty-five years of age or older.

(7) "Examination" of documentary material includes the inspection, study, or copying of any such material and the taking of testimony under oath or acknowledgment in respect to any such documentary material or copy thereof.

(8) "Person" means a natural person, corporation, trust, partnership, incorporated or unincorporated association, and any other legal entity.

(9) "Trade" or "commerce" means the advertising, offering for sale, sale, or distribution of any services and any property, corporeal or incorporeal, immovable or movable, and any other article, commodity, or thing of value wherever situated, and includes any trade or commerce directly or indirectly affecting the people of the state.

(10) "Knowingly" means that the act or practice used was such that a reasonably prudent businessman knew or should have known that the act or practice was a violation of this Chapter.

LSA – R.S. 51, § 1405. Unfair acts or practices; interpretation and rulemaking authority

A. Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.

B. The attorney general may make rules and regulations interpreting the provisions of this Chapter consistent with the provisions in R.S. 51:1 through 461.1. Such rules and regulations shall be adopted in the form and manner prescribed by R.S. 49:951 et seq. The validity or applicability of a rule may be determined in an action for declaratory judgment in the district court of the parish in which the division is located or in the parish in which the plaintiff resides or is domiciled. Appeals may be had from any ruling of a district court in accordance with the Code of Civil Procedure, except that such appeals shall be given preference and heard in priority to other appeals.

LSA – R.S. 51, § 1406. Exemptions

The provisions of this Chapter shall not apply to:

(1) Any federally insured financial institution, its subsidiaries, and affiliates or any licensee of the Office of Financial Institutions, its subsidiaries, and affiliates or actions or transactions subject to the jurisdiction of the Louisiana Public Service Commission or other public utility regulatory body, the commissioner of financial institutions, the insurance commissioner, the financial institutions and insurance regulators of other states, or federal banking regulators who possess authority to regulate unfair or deceptive trade practices.

(2) Acts done by the publisher, owner, agent or employee of a newspaper, periodical or radio or

television station or other advertising medium in the publication or dissemination of an advertisement when the publisher, owner, agent or employee did not have knowledge of the false, misleading or deceptive character of the advertisement, did not prepare the advertisement and did not have any direct financial interest in the sale or distribution of the advertised product or service.

(3) No seller of any product or service who disseminates any advertisement or promotional material in this state shall be liable under this Chapter if he receives the advertisement or promotional material from a manufacturer, packer, distributor, or other seller from whom he has purchased the product or service unless he refused on the request of the attorney general to provide the name and address of the manufacturer, packer, distributor, or other seller from whom he has purchased the product or service and said seller also agrees to enter into an assurance of voluntary compliance as prescribed by this Chapter from disseminating any such advertisement or promotional material thereafter. This exemption does not in any way limit the right of action any consumer may have under this Chapter.

(4) Any conduct which complies with section 5(a)(1) of the Federal Trade Commission Act [15 U.S.C., 45(a)(1)], as from time to time amended, any rule or regulation promulgated thereunder and any finally adjudicated court decision interpreting the provisions of said Act, rules and regulations.

LSA – R.S. 51, § 1409. Private actions

A. Any person who suffers any ascertainable loss of money or movable property, corporeal or incorporeal, as a result of the use or employment by another person of an unfair or deceptive method, act, or practice declared unlawful by R.S. 51:1405, may bring an action individually but not in a representative capacity to recover actual damages. If the court finds the unfair or deceptive method, act, or practice was knowingly used, after being put on notice by the attorney general, the court shall award three times the actual damages sustained. In the event that damages are awarded under this Section, the court shall award to the person bringing such action reasonable attorney fees and costs. Upon a finding by the court that an action under this Section was groundless and brought in bad faith or for purposes of harassment, the court may award to the defendant reasonable attorney fees and costs.

B. Upon commencement of any action brought under Subsection A of this Section, the plaintiff's attorney shall mail a copy of the petition to the attorney general, and, upon entry of any judgment or decree in the action, shall mail a copy of such judgment or decree to the attorney general, but failure to conform with this Subsection shall not affect any of plaintiff's rights under this Section.

C. Any permanent injunction, judgment or order of the court made under R.S. 51:1407 and R.S. 51:1408 shall be prima facie evidence in an action brought

under R.S. 51:1409 that the respondent used or employed a method, act or practice declared unlawful by R.S. 51:1405 or by rule or regulation promulgated pursuant thereto; provided, however, that this subsection shall not apply to consent orders or voluntary assurances of compliance.

D. If any person is enjoined from the use of any method, act, or practice or enters into a voluntary compliance agreement accepted by the attorney general under the provisions of this Chapter, such person shall have a right of action to enjoin competing businesses engaged in like practices.

E. The action provided by this section shall be prescribed by one year running from the time of the transaction or act which gave rise to this right of action.

[SEAL] **STATE OF LOUISIANA**
DEPARTMENT OF PUBLIC SAFETY
AND CORRECTIONS

PUBLIC SAFETY SERVICES

EDWIN W. EDWARDS
GOVERNOR

COL
PAUL W. FONTENOT
DEPUTY SECRETARY

July 18, 1994
3650/0248/MP/0004/SAQ

Mr. Charles S. Lambert, Jr.
Attorney at Law
121 Convention Street
Baton Rouge, Louisiana
70801

Robert L. Freeman
Joseph Brantley
2237 South Acadian Thruway
Baton Rouge, Louisiana
70808

Mr. Paul West
Attorney at Law
One American Place,
Ninth Floor
Baton Rouge, Louisiana
70825

C. J. Blache
Emile Rolfs
23rd Floor,
One American Place
Baton Rouge, Louisiana
70825

Re: Notice of Decision

Gentlemen:

The Division has rendered its decision on the applications of Catfish: Queen Partnership in Commendam/ Jazz Enterprises, Inc., Louisiana Casino Cruises, Inc., and Lady Luck Baton Rouge Casino, Inc.

Enclosed is a copy of the Division's Reasons for Ruling and the Division's orders in this matter.

Thank you for your attention to this matter.

Sincerely

/s/ Lt. Marcal Poullard

Lt. Marcal Poullard
Supervisor
Riverboat Gaming
Enforcement Division

c. Stephen A. Quidd

IN RE: APPLICATION OF LADY LUCK BATON ROUGE CASINO, INC., LOUISIANA CASINO CRUISES, INC. AND CATFISH QUEEN PARTNERSHIP IN COMMENDAM/JAZZ ENTERPRISES, INC. FOR A LICENSE TO CONDUCT GAMING ACTIVITIES ON A RIVERBOAT IN BATON ROUGE

REASONS FOR RULING

A public hearing was conducted by the Riverboat Gaming Enforcement Division of the Office of State Police to consider the applications of Lady Luck Baton Rouge Casino, Inc., Louisiana Casino Cruises, Inc., and Catfish Queen Partnership In Commendam/ Jazz Enterprises, Inc., for the two remaining licenses to conduct gaming activities on riverboats in the State of Louisiana. This hearing was conducted over a three day period: Thursday, July 7, 1994; Friday, July 8, 1994; and Monday, July 11, 1994. This hearing was conducted pursuant to the authority contained in the Louisiana Riverboat Economic Development and Gaming Control Act, R.S. 4:501 et. seq, and particularly R.S. 4:533.

A. PROCEDURE

A meeting was held Friday, June 24, 1994 with the attorneys for the three applicants and the attorneys for the Division. This meeting was held to discuss the procedure that would be followed during the hearing.

The order of presentation by the three applicants was determined by a representative of each applicant selecting a sheet of paper with the number one, two, or three written on it. Lady Luck drew number one and thus was to go first. Louisiana Casino Cruises drew number two and was to go second. Catfish Queen drew number three and was to make the last presentation. Each applicant would be given three hours to make its presentation to the Division's panel. The Division's presentation was to be included in this three hour period.

Dr. Perryman was scheduled to give his presentation on Friday, July 8, 1994, at 1:30 p.m. Dr. Perryman would deliver his report to the Division at that time and copies of the report would be made available to each of the applicants.

It was agreed among the parties present at the meeting held on June 24, 1994 that each applicant would be given one hour to present evidence in rebuttal to Dr. Perryman's report on Monday, July 11, 1994. The order of the presentations would be in inverse order to the ranking in Dr. Perryman's report.

A letter was sent to each applicant following this meeting. This letter addressed the topics discussed at the June 24, 1994 meeting. This letter stated among other things that each presentation should address all aspects of the applicant's qualifications to receive a license as is contained In the Louisiana Riverboat Economic Development and Gaming Control Act and

that each applicant bore the burden of proof regarding their respective applications for a license.

No objections were made to this procedure until Monday, July 11, 1994, at which time Lady Luck filed a motion to continue the hearing. A ruling on the motion was deferred until the conclusion of the rebuttal portion of the hearing, at which time, the motion to continue was denied for the oral reasons that were read into the record.

The matter was taken under advisement and the hearing was adjourned at the conclusion of the proceeding on Monday, July 11, 1994.

While this matter was under advisement, Lady Luck's attorney sent a correspondence to the panel requesting that the hearing be reopened. This correspondence appeared on its face to be an ex parte communication, therefore the panel took no action in response to the correspondence. These facts were communicated to the attorneys for each applicant by a correspondence from the Division's attorney.

Lady Luck subsequently filed a formal motion to reopen the hearing. This motion incorporated the request contained in the correspondence sent to the panel and added two additional grounds. This motion was filed with Division on Friday, July 15, 1994. The Division's attorney requested the representatives of Louisiana Casino Cruises and Catfish Queen file their opposition to the motion to reopen the hearing. Louisiana Casino Cruises filed an opposition with the Division on the same day.

An order was signed on the afternoon of Friday, July 15, 1994 denying Lady Luck's motion to reopen the hearing.

B. FINDINGS OF FACT

1. EVALUATION OF APPLICANTS BY PERRYMAN CONSULTANTS, INC.

Dr. Perryman's report ranked the three applicants for the two Baton Rouge licenses in terms of economic impact as follows:

1. Catfish Queen Partneship [sic] In Commendam/ Jazz Enterprises, Inc.

2. Louisiana Casino Cruises, Inc.

3. Lady Luck Baton Rouge Casino, Inc.

This ranking is based on the evaluation performed by Perryman Consultants, a copy of which was introduced into evidence. The scope of this study was limited to the ranking of the three applicants based on their economic impact. This report did not address the desirability of gaming activities in Baton Rouge nor did it address the number of licensed gaming establishments which could successfully compete in the Baton Rouge market.

Dr. Perryman's evaluation considered only the new net economic impact that each of the applicants would have on Baton Rouge and state markets.

Extensive source materials were used by Dr. Perryman in conducting this evaluation. This fact is

reflected by the list on pages 11 and 12 of the report as well by Dr. Perryman's testimony.

Dr. Perryman assigned probabilities to each phase contained in the respective applicants' proposals. The probabilities reflected the likelihood of the investment in the applicant's project and the time frame in which the investment is likely to occur. Dr. Perryman's use of these assigned probabilities appear appropriate and the use of these probabilities is supported by other evidence in the record.

Dr. Perryman assigned high probabilities to the riverboats. In each case, the applicant has begun construction of its riverboat. As another example, Dr. Perryman assigned slightly lower probabilities to the hotels proposed by two of the applicants. The hotel proposed by Catfish Queen is contained in a later phase of their development and the hotel proposed by Lady Luck will require extensive and probably lengthy renovations because of its abandoned state.

The data used by Dr. Perryman was submitted to the respective applicants for final review, modification and approval. Each applicant, therefore, had significant input into the numbers used in Dr. Perryman's evaluation even though one applicant now contends the numbers used have caught them by surprise.

The record contains other evidence which supports the ranking of the three applicants.

The evidence adduced during the presentation by Louisiana Casino Cruises indicates that Baton Rouge will depend heavily on the local market for its gaming patrons. This evidence was introduced before the Division or any of the applicants heard Dr. Perryman's presentation. This corroborates Dr. Perryman's evaluation that Baton Rouge will depend heavily on the local market.

The applicants ranked number one and two will be able to commence operations at least several months before Lady Luck can possibly commence operations. These earlier commencement dates mean a quicker positive impact on the Baton Rouge and the state economy. Although Lady Luck projects a start up some time in December, Lady Luck does not have any of the necessary permits to conduct operations in and along the Mississippi River. Considering all of the problems that can arise in a licensing or permitting process, Lady Luck's operations could be delayed anywhere from six to twelve months.

There could be additional delays regarding docking facilities as is reflected by the proposed condition the Division was considering for Lady Luck if they were to be licensed.

Finally, delays may arise in connection with Lady Luck's financing. The Lady Luck Gaming Corporation has pledged to provide the financing for the project from funds the company had raised for other projects. The filings Lady Luck made with the Securities Exchange Commission do not include the Baton Rouge

project in its list of proposals. The Lady Luck Gaming Corporation may encounter difficulties with its investors or the federal government before any of this money is successfully diverted to the Baton Rouge, project.

The assumptions and statistics used by Dr. Perryman are appropriate and are reasonable in light of the corroborating evidence in the record. Further, the rankings are consistent with the other evidence presented at the hearing. Finally, Dr. Perryman's evaluation is more credible than that of Lady Luck's economist. Dr. Perryman has no interest in the outcome of this hearing. The other economist were [sic] retained by Lady Luck with the intent of advancing Lady Luck's interest.

Dr. Perryman's evaluation of the economic impact of the three applicants was conducted pursuant to the specifications of the Division and it is appropriate to consider the report in the licensing decision. Dr. Perryman's evaluation is entitled to greater weight than the testimony and reports submitted by the economist appearing on behalf of Lady Luck.

2. SUITABILITY

The suitability of the applicants ranked number one and two has been established by the evidence introduced at the public hearing.

a. CATFISH QUEEN LIMITED PARTNERSHIP/JAZZ ENTERPRISES, INC.

The qualifications of this applicant were addressed by the testimony of Senior Trooper Kelly Garrison, Jim Dogans, Earl Millet, and the presentation of Catfish Queen/Jazz.

The testimony presented by the Division reveals that there are no discrepancies which would disqualify the applicant as provided in R.S. 4:530 and 531. The testimony reflected that the applicant had the necessary gaming experience, the necessary financing and a designated docking facility.

All persons associated with the applicant have been found to be suitable. Trooper Garrison specifically testified there are no persons who the Division feels should divest themselves of their interest in the applicant. (Hearing Transcript, July 8, 1994, page 11, line 25 through page 12, line 7).

Argosy is the general partner of Catfish Queen Partnership In Commendam, thus Argosy will be primarily responsible for the gaming operations. Argosy is currently licensed in Illinois. Argosy has no record of any criminal or administrative violations relating to their gaming operations. Therefore, Argosy has the experience necessary to conduct gaming activities. (Hearing Transcript, July 8, 1994, page 12, lines 8 through 23).

Earl Millet of the Department of Revenue and Taxation testified that there were no factors or

concerns which could preclude a finding of financial suitability. (Hearing Transcript, July 8, 1994, page 17, line 5 through line 23). The Department of Revenue and Taxation also verified funds in excess of fifty million dollars ($50,000,000) were available to finance and finish this project. (Hearing Transcript, July 8, 1994, page 18, line 25, through page 19, line 4).

Trooper Garrison's testimony also reflects the applicant has designated a docking facility. (Hearing Transcript, page 11, lines 16 through 20). The docking facility has been approved by the Coast Guard and the Corp of Engineers. (Hearing Transcript, July 8, 1994, page 64, line 2 through line 15).

The applicant's presentation reveals that the applicant has the necessary marine experience and a plan to train and upgrade minorities in employment. The applicant also presented the plans for its riverboat and for its internal controls. (Internal controls are addresses in R.S. 4:531).

The applicant's presentation reveals that Argosy has extensive experience as a riverboat operator. Further, they have retained a local marine operator with extensive experience to handle the operation of the riverboat. (Hearing Transcript, page 36, line 11, through page 40, line 8).

A plan to train and up grade [sic] minorities was presented to the Division. (Hearing Transcript, July 8, 1994, page 45, line 24, through page 48, line 20; and page 66, line 5, through page 67, line 4). This

plan addressed both minority employment and minority business participation.

The internal controls were submitted to the Division on Thursday, July 7, 1994. (Hearing Transcript, July 8, 1994, page 65, lines 10 through 17).

The riverboat design has been submitted by the applicant. (Hearing Transcript, July 8, 1994, page 40, line 9, through page 41, line 1).

This applicant is found to have met the suitability requirements contained in the Louisiana Riverboat Economic Development and Gaming Control Act and its qualified to receive a license.

b. LOUISIANA CASINO CRUISES

The qualifications of this applicant were addressed by the testimony of Trooper Joyce Thibodaux, Anthony Hamilton, Jean Spriggs and the presentation of Louisana [sic] Casino Cruises.

The testimony presented by the Division reveals that there are no discrepancies which would disqualify the applicant as provided. in R.S. 4:530 and 531. The testimony reflects that the applicant, has the necessary gaming experience, the necessary financing and a designated docking facility.

The applicant's presentation reveals that the applicant has the necessary marine experience and a plan to train and upgrade minorities in employment. The applicant also presented the plans for its

riverboat and for its internal controls. (Internal controls are addresses in R.S. 4:531).

Trooper Thibodaux testified all persons associated with the applicant have been determined not to be subject to any concerns or discrepancies which could serve to disqualify the applicant. (Hearing Transcript, July 7, 1994, page 187, line 11, through page 188, line 7). There was one person associated with Capitol Lakes Properties, the lessor of the land for the docking facility, over whom the Division expressed concern. John Pete Clements, who owned approximately nine per cent of Capitol Lakes Properties, was convicted of tax evasion and lying to the IRS. This person has agreed to divest himself of any interest he has in Capitol Lake Properties. (Hearing Transcript, July 7, 1994, page 188, line 4, through page 189, line 19).

Anthony Hamilton testified concerning the applicant's financial ability to construct and operate its facilities. The applicant has interim financing of ten million dollars ($10,000,000.00) from Carnival Hotels and Casinos. A fifty-one million dollar ($51,000,000.00) bond offering with warrants was placed through Salomon Brothers and Oppenheimer. This financing covers the projected cost of the project, sixty-one million dollars ($61,000,000.00). Hearing Transcript, July 7, 1994, page 183, line 2, through page 185, line 3; and page 193, line 4, through line 13).

The ownership of Louisiana Casino Cruises, Inc. consist of Thomas Mechan, Dan S. Meadows, Jerry

Balyes, and Carnival Hotels and Casinos. Carnival Hotels and Casinos is the majority owner of the applicant. Carnival Hotels and Casinos was created from the gaming businesses contained in Carnival Cruise Lines which includes approximately twelve shipboard casinos. (Hearing Transcript, July 7, 1994, page 178, line 14, through page 181, line 5). These facts establish the applicant is capable of conducting gaming operations.

The applicant has the ability to operate a riverboat as Carnival hotels and Casinos' parent company, Carnival Cruise Lines operates a large number of ocean going vessels. The applicant has hired several experienced people to handle its marine operations, and it has worked closely with the Coast Guard to insure [sic] the applicant's operations are in compliance with the appropriate laws and regulations. (Hearing Transcript, July 7, 1994, page 205, line 4 through line 22; and page 231, line 8 through page 235, line 5).

The plans for the riverboat were submitted to the Division and described in the testimony presented by the Division and the applicant. (Hearing Transcript, July 7, 1994, page 181, line 6, through page 182, line 23; and page 209, line 9, through page 210, line 6).

The applicant has designated a docking facility on the Mississippi River across from the state capitol. (Hearing Transcript, July 7, 1994, page 181, line 6, through line 19; and page 210, line 7, through line 21). The land for the docking facility is being leased from Capitol Lake Properties.

The applicant has developed a good faith plan to recruit, train, and upgrade minorities. The applicant's work force currently consist of thirty-nine per cent (39%) black and fifty-two per cent (52%) women. (Hearing Transcript, July 7, 1994, page 226, line 5, through page 230, line 13).

The applicant has developed a good faith plan to provide the maximum practical opportunities for the broadest possible participation of minority businesses. The applicant has developed a minority advisory board to promote these opportunities. (Hearing Transcript, July 7, 1994, page 243, line 4, through page 250, line 21).

The applicant had submitted its internal controls to the Division several weeks prior to the hearing. The applicant's presentation provided a brief description of the personnel who would be responsible for the riverboat's internal controls. (Hearing Transcript, July 7, 1994, page 221, line 5, through page 225, line 21).

This applicant is found to have met the suitability requirements contained in the Louisiana Riverboat Economic Development and Gaming Control Act and is qualified to receive a license.

c. LADY LUCK BATON ROUGE CASINO, INC.

Since the applicants ranked number one and number two in the Perryman Consultant's study have

met the suitability requirements contained in the Louisiana Riverboat Economic Development and Gaming Control Act, it is not necessary to make a ruling on this applicant's suitability at this time.

Since a public hearing was held on Lady Luck's application, R.S. 4:533 requires the Division to either grant or deny a license. Any ruling on suitability when a license is denied would serve no purpose.

Any such ruling would only be of an advisory nature. If a license were to become available in the future, the applicant would have to reapply with the Division. The Division would have to reevaluate the applicant's suitability for a license at that time.

C. LAW

The qualifications for an applicant for a gaming license are contained in R.S. 4:525, 530, 531, 532 and 536.

The applicants ranked number one and two in the Perryman Consultant's report, Catfish Queen Partnership In Commendam/Jazz Enterprises, Inc. and Louisiana Casino Cruises, Inc., have qualified to receive licenses to conduct gaming activities by meeting the requirements contained in the Louisiana Riverboat Economic Development and Gaming Control Act.

D. CONCLUSION

The Division will grant a license to conduct gaming activities on a riverboat to Catfish Queen Partnership In Commendam/Jazz Enterprises, Inc. subject to the conditions accepted by the applicant at the public hearing.

The Division will grant a license to conduct gaming activities on a riverboat to Louisiana Casino Cruises, Inc. subject to the conditions accepted by the applicant at the public hearing.

The Division will deny a license to Lady Luck Baton Rouge Casino, Inc. The grounds for the denial will be that all fifteen licenses authorized by Louisiana Riverboat Economic Development and Gaming Control Act have been issued. This denial is without prejudice. The applicant may reapply to the Division in the future should any licenses become available.

READ, RENDERED AND SIGNED in Baton Rouge, Louisiana, this 18th day of July, 1994.

/s/ Lt. Marcal Poullard
LT. MARCAL POULLARD
SUPERVISOR
RIVERBOAT GAMING
ENFORCEMENT DIVISION

IN RE: APPLICATION OF LADY LUCK BATON ROUGE CASINO, INC., LOUISIANA CASINO CRUISES, INC., AND CATFISH QUEEN PARTNERSHIP IN COMMENDAM/JAZZ ENTERPRISES, INC. FOR A LICENSE TO CONDUCT GAMING ACTIVITIES ON A RIVEBOAT [sic] **IN BATON ROUGE**

ORDER

Considering the testimony and other evidence presented at the public hearing held on Thursday, July 7, 1994, Friday, July 8, 1994, and Monday July 11, 1994:

IT IS ORDERED that Catfish Queen Partnership In Commendam/Jazz Enterprises is granted a license to conduct gaming activities on a riverboat from the docking facility at Catfish Town. This license is subject to the following conditions:

1. The applicant operate under his plan of security and internal controls for a period of six months, allowing the Division to make any changes it deems necessary.

2. The applicant submit to a mock cruise prior to the commencement of gaming activities for the general public. The mock cruise shall not be conducted until the vessel is certificated by the United States Coast Guard.

3. The vessel shall be certificated by the United States Coast Guard. Such certification shall not have

any restrictions attached. This is a permanent condition.

4. The applicant obtain approval of the docking facility from the appropriate federal agencies.

5. The applicant shall remit the fifty thousand dollar ($50,000.00) application fee to the Division no later than 4:30 p.m. on July 22, 1994.

6. The Division approves the slot configuration on the vessel. This is a permanent condition.

7. The licensee will, within thirty days, conduct and deliver to the Division an underwater survey of the route to determine the presence of underwater obstructions of a magnitude which would prevent the riverboat from cruising. Should an underwater obstruction of a nature that would prevent cruising be discovered, then the licensee will not commence operations without the Division's approval.

8. The licensee shall install separate turnstiles for each exit and entrance to the riverboat to determine the number of patrons entering and exiting the vessel for each scheduled cruise.

Each turnstile shall contain a meter which will count each patron as they enter or exit the vessel. Each meter will be read and a record made of the meter shown both before and after the scheduled excursion. All meters shall be read at the same time. No boarding shall be allowed while the meters are being read.

All patrons shall enter and exit through a turnstile unless a physical handicap makes this impractical. In such case, the licensee shall keep a separate and distinct record of the number of such persons entering and exiting the vessel.

If the licensee permits employees to engage in gaming activities before or after working, the employee must exit and reenter the vessel.

The licensee shall make monthly reports to the Division in a format approved by the Division. This is a permanent condition.

9. The licensee provide the Department of Revenue and Taxation with a completed representation letter from Ronald Johnson within ten days of the date of this order.

This order shall serve as a conditional license. The licensee may commence activities for which a license is required upon the receipt of this document. A permanent license will be issued upon compliance with the above stated conditions.

READ, RENDERED AND SIGNED this 18th day of July, 1994 in Baton Rouge, Louisiana.

/s/ Lt. Marcal Poullard

LT. MARCAL POULLARD
SUPERVISOR
RIVERBOAT GAMING
ENFORCEMENT DIVISION

IN RE: APPLICATION OF LADY LUCK BATON ROUGE CASINO, INC., LOUISIANA CASINO CRUISES, INC., AND CATFISH QUEEN PARTNERSHIP IN COMMENDAM/JAZZ ENTERPRISES, INC. FOR A LICENSE TO CONDUCT GAMING ACTIVITIES ON A RIVEBOAT [sic] **IN BATON ROUGE**

ORDER

Considering the testimony and other evidence presented at the public hearing held on Thursday, July 7, 1994, Friday, July 8, 1994, and Monday July 11, 1994:

IT IS ORDERED that Louisiana Casino Cruises, Inc., is granted a license to conduct gaming activities on a riverboat from the docking facility near the state capitol. This license is subject to the following conditions:

1. The applicant operate under his plan of security and internal controls for a period of six months, allowing the Division to make any changes it deems necessary.

2. The applicant submit to a mock cruise prior to the commencement of gaming activities for the general public. The mock cruise shall not be conducted until the vessel is certificated by the United States Coast Guard.

3. The vessel shall be certificated by the United States Coast Guard. Such certification shall not have

any restrictions attached. This is a permanent condition.

4. The applicant shall remit the fifty thousand dollar ($50,000.00) application fee to the Division no later than 4:30 p.m. on July 22, 1994.

5. The Division approves the slot configuration on the vessel. This is a permanent condition.

6. The licensee will, within thirty days, conduct and deliver to the Division an underwater survey of the route to determine the presence of underwater obstructions of a magnitude which would prevent the riverboat from cruising. Should an underwater obstruction of a nature that would prevent cruising be discovered, then the licensee will not commence operations without the Division's approval.

7. The licensee shall install separate turnstiles for each exit and entrance to the riverboat to determine the number of patrons entering and exiting the vessel for each scheduled cruise.

Each turnstile shall contain a meter which will count each patron as they enter or exit the vessel. Each meter will be read and a record made of the meter shown both before and after the scheduled excursion. All meters shall be read at the same time. No boarding shall be allowed while the meters are being read.

All patrons shall enter and exit through a turnstile unless a physical handicap makes this impractical. In such case, the licensee shall keep a separate

and distinct record of the number of such persons entering and exiting the vessel.

If the licensee permits employees to engage in gaming activities before or after working, the employee must exit and reenter the vessel.

The licensee shall make monthly reports to the Division in a format approved by the Division. This is a permanent condition.

8. Mr. Pete Clements shall sell all of his stock in Capitol Lakes Properties within thirty days of the date of this order. The Division must receive documentation verifying the sale of the stock and Mr. Clements' resignation within thirty-five days of the date of this order.

This order shall serve as a conditional license. The licensee may commence activities for which a license is required upon the receipt of this document. A permanent license will be issued upon compliance with the above stated conditions.

READ, RENDERED AND SIGNED this 18th day of July, 1994 in Baton Rouge, Louisiana.

/s/ Lt. Marcal Poullard

LT. MARCAL POULLARD
SUPERVISOR
RIVERBOAT GAMING
ENFORCEMENT DIVISION

IN RE: APPLICATION OF LADY LUCK BATON ROUGE CASINO, INC., LOUISIANA CASINO CRUISES, INC., AND CATFISH QUEEN PARTNERSHIP IN COMMENDAM/JAZZ ENTERPRISES, INC. FOR A LICENSE TO CONDUCT GAMING ACTIVITIES ON A RIVEBOAT [sic] **IN BATON ROUGE**

ORDER

Considering the testimony and other evidence presented at the public hearing held on Thursday, July 7, 1994, Friday, July 8, 1994, and Monday July 11, 1994:

IT IS ORDERED that Lady Luck Baton Rouge Casino be denied a license to conduct gaming activities on a riverboat. This application is denied on the grounds that all fifteen licenses have been issued. This denial is without prejudice.

READ, RENDERED AND SIGNED this 18th day of July, 1994 in Baton Rouge, Louisiana.

/s/ Lt. Marcal Poullard
LT. MARCAL POULLARD
SUPERVISOR
RIVERBOAT GAMING
ENFORCEMENT DIVISION

IN RE: APPLICATION OF LADY LUCK BATON ROUGE CASINO, INC., LOUISIANA CASINO CRUISES, INC. AND CATFISH QUEEN PARTNERSHIP IN COMMENDAM/JAZZ ENTERPRISES, INC. FOR A LICENSE TO CONDUCT GAMING ACTIVITIES ON A RIVERBOAT IN BATON ROUGE

SUPPLEMENTAL REASONS FOR RULING

A public hearing was conducted by the Riverboat Gaming Enforcement Division of the Office of State Police to consider the applications of Lady Luck Baton Rouge Casino, Inc., Louisiana Casino Cruises, Inc., and Catfish Queen Partnership In Commendam/ Jazz Enterprises, Inc., for the two remaining licenses to conduct gaming activities on riverboats in the State of Louisiana.

On July 18, 1994, Reasons For Ruling and an order regarding each applicant were rendered. Licenses were granted to Louisiana Casino Cruises, Inc., and Catfish Queen Partnership In Commendam. Lady Luck Baton Rouge Casino, Inc., was denied a license.

The Reasons For Ruling did not make a finding regarding the suitability of Lady Luck who was denied a license.

On July 21, 1994, Lady Luck filed a motion for reconsideration of the decision on suitability. This motion asks the Division to amend the reasons for Ruling to state that Lady Luck was found to be suitable to conduct gaming activities on a riverboat.

The Division asked the other two applicants to file responsive pleadings to Lady Luck's motion. Louisiana Casino Cruises, Inc., filed a memorandum in opposition. The Division was advised by counsel for Catfish Queen that it would file no opposition. The Division requested Catfish Queen file a letter with the Division officially stating their position.

The attorney for the Division conferred with the attorneys for Lady Luck and Louisiana Casino Cruise to discuss the procedure that would be used at the hearing on the motion. Attorneys for both applicants waived formal notice of the hearing.

The matter was submitted to the Division on briefs prepared by Lady Luck and Louisiana Casino Cruises.

During the decision making process, the Division considered the qualifications of all three applicants. The Division determined that the three applicants met the qualifications requirements contained in the Riverboat Act to varying degrees. Lady Luck was ranked third among the three applicants in this area due to concerns regarding its financing, its docking facility, its lack of the necessary permits from the Coast Guard and the Corp of Engineers, and the resulting delay in the commencement of operations because of these concerns.

The Division considered the Perryman Report in reaching its decision regarding the qualifications of the three applicants. The Division found that the ranking by the Perryman Report on the economic

impacts of the three applicants was consistent with the Division's ranking regarding the qualifications of the applicants.

In light of these rankings, licenses were issued to Catfish Queen and Louisiana Casino Cruises.

It is the finding of the Division that Lady Luck is found suitable, however all of the findings expressed in the original reasons of ruling are incorporated by reference and the ranking and licensing of the applicants remains unchanged.

In light of this ruling, it is unnecessary to amend the order regarding Lady Luck.

READ, RENDERED AND SIGNED this 22nd day of July, 1994, in Baton Rouge, Louisiana.

/s/ Lt. Marcal Poullard

LT. MARCAL POULLARD
SUPERVISOR
RIVERBOAT GAMING
ENFORCEMENT DIVISION